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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1685

BEN OWEN,
Petitioner,

v.

ANGELINE BARBARA OWEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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WO. 2-8745—WO. 2-8732

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The Petitioner, Ben Owen, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Michigan rendered in these proceedings on March 22, 1973.

OPINIONS BELOW

The opinions of the Supreme Court being 386 Michigan 785 205 NW2d 181 (1973), appear at Appendix, A, *infra,* page 15; the opinion of the Court of Appeals, Third Division, 36 Mich App 203, 194 NW2d 67 (1972), and appears in Appendix B, *infra,* page 20. The Allegan County Circuit Court order is unreported, and appears at Appendix C, *infra,* page 26. The Michigan Supreme Court reversed the Michigan Court of Appeals as to the holding that the Petitioner's Nevada divorce was void as to a prior order of separate maintenance granted to the Defendant-wife by Michigan Court, but affirmed the Michigan Court of Appeals on the question of the prior Michigan separate maintenance decree surviving a sister state's *ex-parte* divorce decree. And the Michigan Court of Appeals affirmed the lower Court's order voiding the Nevada Judgment (but for different reasons) and affirming past due support arrearages.

JURISDICTION

The order or judgment of the Supreme Court of the State of Michigan was entered on the 22nd day of March, 1973. See Appendix A, page 15 *infra.* This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. That the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

The Petitioner attempted to have the weekly separate maintenance payments terminated effective the date of the entry of his Nevada *Ex-Parte* Divorce Decree, and the Michigan Supreme Court held that a sister state *Ex-Parte* Judgment of Divorce does not terminate a Michigan Separate Maintenance order, even though case law in the State of Michigan also holds that a Michigan *Ex-Parte* Judgment of Divorce terminates a sister state Separate Maintenance order. The questions thereby arising are:

1. Whether the action of the Michigan Supreme Court in (a) holding that a sister state *ex-parte* judgment of divorce does not terminate a Michigan separate maintenance order, and (b) also holding that a Michigan *ex-parte* Judgment of Divorce terminates a foreign separate maintenance judgment, is a denial of full faith and credit as required by U.S. Constitution, Article 4, Section 1.

2. Whether the Michigan Supreme Court Opinions, which constitute State action, which declare that a Michigan *Ex-Parte* Judgment of Divorce terminates a sister state support order, whereas a sister state *ex-parte* judgment of divorce does not terminate a Michigan separate maintenance order, is a denial of equal protection of the law, U.S. Constitution, Fourteenth Amendment Sectoin 1, in that it grants relief requested by the Petitioner to residents of the State of Michigan but denies the same relief to non-residents who are subject to the Court's jurisdiction?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article four, section 1:

> "Full faith and credit shall be given in each state to the Public Acts, records, and judicial proceedings of every other State. . . ."

U.S. Constitution, Fourtenth Amendment, Section 1:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States * * * nor deny to any person within it's jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On December 21, 1964, Ben Owen filed a complaint for absolute divorce in the Circuit Court of Allegan County and answer thereto by Angeline Barbara Owen was filed on January 26, 1965. On February 4, 1965, Angeline Barbara Owen filed a cross complaint for separate maintenance, and an answer thereto was filed by Ben Owen on February 15, 1965. After a contested trial, the Court denied the Plaintiff's requested relief for an absolute divorce and granted the Defendant and Cross-Plaintiff's prayer for separate maintenance, and on the 26th day of July, 1965, a Judgment for Separate Maintenance was entered wherein Mrs. Owen was awarded separate maintenance.

Under the terms of said Judgment for Separate Maintenance, Ben Owen was required to pay forty ($40.00) dollars per month in support of his wife together with other expenses.

On the 1st day of August, 1965, Ben Owen moved to the State of Nevada, having acquired a residence there, commenced an action for absolute divorce on the 14th of September, 1965. The Nevada complaint and summons were personally served upon Mrs. Owen at Grand Rapids, Michigan, on September 16, 1965, as is shown on the affidavit of service dated the 17th of September, 1965, and filed in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark on the 7th day of October, 1965. Mrs. Owen did not in any manner appear or defend the Nevada proceedings and a default judgment of absolute divorce was awarded Ben Owen on October 7, 1965, at Las Vegas, Nevada; the Nevada judgment of divorce did not consider the question of alimony or support.

Ben Owen since the 1st day of August, 1965, has been and still is a resident of the State of Nevada and is employed in the State of Nevada as Director of Counseling and Testing at the University of Nevada at Las Vegas.

On April 12, 1966, the Judgment for separate maintenance that had been entered on July 26, 1965, in Michigan was amended by the Allegan County Circuit Court. The amended version provides that Ben Owen should pay an additional sum of twenty ($20.00) dollars per week to his wife, Angeline Barbara Owen.

Subsequently, Ben Owen, as a Nevada resident, petitioned the Circuit Court for the County of Allegan to amend the Judgment of Separate Maintenance as amended, asking that it be amended to a Judgment for Absolute Divorce and that the Nevada judgment be given full faith and credit in the State of Michigan.

On August 4, 1969, petition came on for hearing before the Circuit Court for the County of Allegan and on October 13, 1969, said Court denied recognition and enforce-

ment of the Nevada Decree because Mr. Owen had not acquired domicile in the State of Nevada when the divorce decree was granted, also ratifying and confirming in all respects the Judgment for Separate Maintenance entered on July 26, 1965, as amended April 12, 1966.

That on October 15, 1969, the Circuit Court for the County of Allegan entered an order denying the Motion and voiding the Nevada Judgment. That on October 15, 1969, the Defendant filed a motion for determination of Plaintiff's past due support arrearages under the reaffirmed separate maintenance judgment; on October 8, 1969, the Plaintiff filed a motion for preliminary injunction seeking to restrain the wife from attempting to enforce in Nevada Court the Michigan Judgment for Separate Maintenance. That on the 10th day of March, 1970, the Circuit Court for the County of Allegan denied the injunction and entered a judgment order determining the past due support-arrearages. Thereafter the Plaintiff appealed to the Michigan Court of Appeals, Division Three and on October 1, 1971, the Michigan Court of Appeals in a two to one decision denied all relief to the Plaintiff and confirmed the Lower Tribunal's orders, but gave as a reason for refusing to recognize the Nevada decree that Michigan had jurisdiction of both parties and that the Nevada Court could not have acquired jurisdiction to grant Mr. Owen an absolute divorce.

That the Supreme Court of the State of Michigan in it's opinion filed March 22, 1973, considered two issues on appeal (1) whether the Plaintiffs (petitioner's) Nevada divorce must be given full faith and credit in Michigan! (Appendix A, p. 15). And to that they answered affirmative (Appendix A, p, 15). (2) If the Plaintiff (Petitioner's) Nevada divorce is valid, does it effect the Plaintiff (Peti-

tioner) obligations imposed by the Judgment of Separate Maintenance? (Appendix A p. 15) And to that the Michigan Supreme Court answered in the negative (Appendix A p. 15) by this statement in it's opinion.

> "Furthermore, the law in Michigan appears to be that ExParte Divorce decisions will not be given full faith and credit with respect to these matters. The policy in Michigan is that the property rights of it's citizens will be protected. We find therefore, that the Nevada divorce did not terminate Plaintiff's obligation to pay support under the prior Michigan Judgment." (Appendix A page 18)

That the above quoting by the Michigan Supreme Court is in direct conflict with a prior Mihcigan case which holds that a Michigan *Ex-Parte* Divorce does terminate a Michigan resident's obligation to pay support under a prior sister state judgment; without reversing or even acknowledging the existence of it's prior and opposite ruling even though such inconsistent positions were specifically called to the Court's attention.

REASONS FOR GRANTING THE WRIT

1. Michigan failed to grant full faith and credit to the Nevada Judgment of Divorce.

The last sentence of the majority opinion in *Estin* v *Estin,* 344 US 541; 68 S Ct 1213; 92 L Ed 1561 (1948) at page 449, states:

> "And it will be time enough to consider the effect of any discrimination shown out of state *ex-parte* divorces when a state makes that it's policy."

It now appears that Michigan has done just that. Without going through the entire historical background of pre and post *Estin* cases in the State of Michigan the principal cases in the State of Michigan are as follows:

(1) *McCullough* v *McCullough,* 203 Mich 288; 168 NW 929 (1918)—Ohio is the marital domicile of both parties; husband left Ohio and moved to Michigan; wife instituted in Ohio an action for alimony (separate maintenance) in which the husband appeared and submitted to the Court's jurisdiction; the Ohio Court granted alimony to the wife; husband returned to Michigan and obtained a divorce and remarried. In 1915, the Ohio order was brought to Michigan to be enforced, but the Court in Michigan denied the Ohio judgment any effect past the date of the Michigan divorce decree. The Michigan Court in it's opinion relied upon *Harrison and Saunders* v *Harrison,* 20 Ala 629 (56 AM DEC 277) which said a decree of divorce terminates the rights of the wife to a prior support or alimony payments dependent upon a marriage status. The Michigan Court in the *McCullough* case, *supra,* said at page 294,

> "* * * We are of the opinion that the divorce decree so changed the legal relation of the parties that the Ohio decree as to future alimony was no longer of any force."

(2) The next case considered by the Michigan Supreme Court was *Malcolm* v *Malcolm,* 345 Mich 720; 76 NW2d 861 (1956).

Michigan was the marital domicile of both parties; husband went to Nevada in 1947 and was granted an *ex-parte* divorce in Nevada on July 11, 1947, and returned to the State of Michigan; on May 6, 1947, the wife filed in Michigan for separate maintenance and the wife was granted a separate maintenance decree Februry 24, 1949. And there-

after the husband filed several petitions to modify the separate maintenance order in Michigan—April 6, 1949, denied; September 11, 1953, conditionally granted; April 26, 1954—gave custody of son to husband; July 13, 1954—which was the first time the Nevada decree in the full faith and credit question was raised, denied.

The Michigan Court said that it might rest the case on estoppel by judgment; however, it went further and said that since Nevada did not consider the support question and Michigan had jurisdiction over both parties, that the question was left to the Michigan Court, citing *Armstrong* v *Armstrong,* 350 US 568, 76 S Ct 629; 100 L Ed 705 (1955). And saying in effect that there was no full faith and credit question here. The *McCullough* case was not mentioned in the *Malcolm* opinion.

(3) The third case considered by the Michigan Supreme Court is *Owen* v *Owen,* 386 Mich 785; 205 NW 2d 181 (1973), the case now under consideration. Michigan was the marital domicile of both parties and on December 21, 1964, the husband files for divorce in Michigan; on January 16, 1965, the wife files a cross complaint for separate maintenance; on July 26, 1965, wife granted the judgment of separate maintenance of $40.00 per week and the husband is denied divorce. The husband moves to Nevada and files for divorce, serving the wife in Michigan, but the wife never appears or defends in Nevada, and an *ex-parte* judgment of divorce was granted in Nevada on October 7, 1965. The husband remains a resident of Nevada, and on May 28, 1969, petitioned the Michigan Circuit Court to amend the Judgment of Separate Maintenance based upon the Nevada judgment of divorce, and on October 15, 1969, the order denying the motion and voiding the Nevada judgment was entered.

Upon review by the Michigan Supreme Court, the full faith and credit question was argued and the apparent conflict between the *McCullough* case, *supra,* and the *Malcolm* case, *supra,* was brought to the Court's attention, and even though the Michigan Court was asked by the Attorney for the Defendant-Appellant to either reverse or affirm the holdings in the *McCullough* case; and not to again ignore them, the Michigan Supreme Court chose to ignore *McCullough.* This leaves the case law in the State of Michigan stating that a Michigan *ex-parte* divorce will terminate a prior foreign alimony or separate maintenance decree, but that an *ex-parte* foreign divorce decree will not terminate a prior Michigan alimony or separate maintenance decree.

That the law of the State of Michigan must decide the issue of continued liability of the husband to pay under a separate maintenance decree issued by Michigan after the *ex-parte* foreign divorce decree. *Estin* v *Estin, supra; Estin* v *Estin,* 296 NY 308; 73 NE 2d 113 (1947); *Sutton* v *Leib,* 342 US 402; 73 S Ct 398; 96 L Ed 448 (1951); *Esenwein* v *Penn,* 325 US 279, 65 S Ct 1118; 89 L Ed 1608 (1945).

In *Williams* v *North Carolina,* 317 US 287, 63 S Ct 207, 87 L Ed 279 (1942) at page 293:

> "Article 4, § 1 of the Constitution not only directs that 'Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state' but also provides that 'Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.' Congress has exercised that power. By the act of May 26, 1790, Chapter 11, 2 USCA 687 [now 28 USCA 1738], Congress has provided that Judgments 'shall have such faith and credit given to them in every court within the United States, as they have by law or

usage in the courts of the state from which they are taken.' Chief Justice Marshall stated in *Hampton* v *M'Connell,* 3 Wheat (US) 234, 235, 4 L Ed 378, 379, that 'the judgment of a state court shall have the same credit, validity and effect, in every other Court of the United States, which it had in the State where it was pronounced, and that whatever pleas would have been good to a suit thereon in such state, and none others, could be pleaded in any other Court in the United States.' That view has survived substantially intact. *Fauntleroy* v *Lum,* 210 US 230, 52 L Ed 1039, 28 S Ct 641. This Court has only recently stated that Art. 4, § 1, and the act of May 26, 1790, require that 'not some, but full' faith and credit be given judgments of a state Court. *Davis* v *Davis,* 305 US 32, 40; 83 L Ed 26, 29, 59 S Ct 3, 118 ALR 1518. * * *"

The words of Mr. Justice Frankfurter in his dissent in *Estin, supra,* beginning at page 550 through 552 now become the principal issues of the case.

"I cannot agree that New York's interest in it's residents would justify New York in giving less effect to an enforceable Nevada divorce granted to one domiciled in Nevada against a spouse not personally served, then it would give to a valid New York divorce similarly obtained. As to this, I agree with the views of my brother Jackson. If, on the other hand, New York does not so discriminate against enforceable 'ex-parte' divorce decrees granted by a sister state, no problem under the full faith and credit clause arises. * * *"

"My difficulty with the third ground of the Court's opinion is that Nevada did not purport, so far as the record discloses, to rule on the survival of the New York separate maintenance decree. Nevada merely established a change in status. It was free for New York to determine the effect, with reference to it's own law, of that change of status. It was the law of New York that divorce put an end to it's separate maintenance decree, the respond-

> ent's decree would have been terminated not by the Nevada divorce but by the consequences, under the New York law, of a change in status, even though brought about by Nevada. * * *
>
> "Accordingly, the crucial issue, as I see it, is whether New York has held that *no* 'ex-parte' divorce decree could terminate a prior New York separate maintenance decree, or whether it has decided merely that no 'ex-parte' divorce decree of another state could. The opinion of the Court of Appeals leaves this crucial issue in doubt. * * *"

The Michigan Supreme Court was presented squarely with the problem created by the holdings in the *McCullough* and *Malcolm* cases, *supra,* and the denial of full faith and credit of a foreign *ex-parte* judgment of divorce, but they chose to duck the issue, thus leaving the Constitutional question for others to answer.

2. "* * * [I]t has been pointed out that the full faith and credit clause requires that a judgment of a sister state be given 'the same faith and credit' it receives in the sister state, but does not require a state to give a divorce decree of a sister state the same effect it gives to it's domestic decrees, and that the dissenters [in the *Estin case, supra*] did not mean to rely upon full faith and credit clause but the equal protection or privileges and immunities clause."

28 ALR d 1390 and see *Morris,* Divisable Divorce, 64 Harv. L. Rev. 1287, 1299 (1955).

> "It is by practical considerations based upon experience rather than theoretical inconsistencies that the question of equal protection is to be answered. *Railway Express Agency, Inc,* v *New York,* 336 US 106, 69 S Ct 463, 93 L Ed 533."

16 Am Jr 2d Constitutional Law §488, page 850, 851, note 13.

"The inhibitions of the Fourteenth Amendment include all departments of State government, not only the political but the judicial. (footnote 1) *Barrows* v *Jackson,* 346 US 249 97 L Ed 1586, 73 S Ct 1031, reh den 346 US 841, 98 L Ed 361, 74 S Ct 19; *Ladner* v *Seigle Co,* 298 PA 487, 148 A 699, 68 ALR 1172.

"The actions of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the equal protection clause. *Shelley* v *Kraemer,* 334 US 1, 92 L Ed 1161, 68 S Ct 836, 3 ALR 2d 441."

16 Am Jur 2d Constitutional Law, §491, pages 854, 855.

The Petitioner by his prior participation in the instant case and the motions in the Michigan suit to terminate the separate mantenance obligations satisfies the "within it's jurisdiction" requirement of the equal protection portion of the Fourteenth Amendment. That to deny the Petitioner by judicial order that which the Michigan Court grants to citizens of Michigan, is a denial of the equal protection of the laws.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Michigan.

Respectfully submitted,

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Dated: June 12, 1973

APPENDIX A

(State of Michigan—Supreme Court)

(Filed March 22, 1973)

Before the Entire Bench
T. G. Kavanagh, J.

This case comes to us from a decision of the Court of Appeals[1] holding plaintiff's Nevada divorce void as to a prior award of Separate Maintenance granted to defendant by a Michigan court.

On December 21, 1964, plaintiff Ben Owen filed a complaint for absolute divorce in the circuit court for Allegan County. Defendant Angeline Barbara Owen filed an answers and a cross-complaint for Separate Maintenance.

After a contested trial, plaintiff was denied an absolute divorce, while defendant was granted an award of Separate Maintenance. Judgment for Separate Maintenance was entered on July 26, 1965 which included a requirement that plaintiff pay to defendant the sum of forty dollars per week plus other expenses as support.

In August of 1965, plaintiff moved to the State of Nevada and there commenced an action for absolute divorce. Defendant was served in Michigan with a copy of the Nevada complaint and summons.

On October 7, 1965, plaintiff obtained a judgment for absolute divorce from the Nevada court. He has lived in Nevada continuously since that time.

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[1] 36 Mich 203 (1971).

Following his award for absolute divorce in Nevada plaintiff petitioned the Allegan County circuit court to amend its earlier judgment for Separate Maintenance to one of absolute divorce. The petition was denied. The Court of Appeals affirmed.

In essence, two issues are presented on appeal:

1) Whether plaintiff's Nevada divorce must be given full faith and credit in Michigan.

2) If plaintiff's Nevada divorce is valid, does it affect plaintiff's obligations imposed by the Judgment for Separate Maintenance?

The trial court based its holdings that the Nevada divorce was not entitled to full faith and credit on a finding that plaintiff had not established domicile in Nevada. Such a finding is clearly contrary to the evidence. The Nevada court expressly found that plaintiff has established domicile. Furthermore, plaintiff had resided continuously in Nevada since the divorce was granted. This is not a case where a person went to Nevada purely for the purpose of obtaining a divorce. The decision of the trial court was erroneous, and cannot be grounds for finding the Nevada divorce invalid.

The majortiy opinion in the court of appeals held that the Nevada court could not properly obtain jurisdiction since there was a prior pending action in Michigan. It was this holding that was the subject of the dissent. The cause had been tried, and a final judgment had entered. Although a claim of appeal had been filed there was no bar of a pending action in Michigan.[2] This too then was not proper ground for invalidating the Nevada divorce.

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[2] Even if the claim of appeal made the matter pending in Michigan, this does not prevent the Nevada court from adjudicating the cause. See *In Re Elliott's Estate*, 285 Mich 579 (1938).

It has long been held that an ex parte divorce, obtained by substituted service on defendant, is valid absent other irregularities.[3] The Constitution of the United States requires that sister-states give such divorce decrees full faith and credit.[4] We hold that such is the case here and that Michigan must recognize this divorce.

The fact that plaintiff's Nevada divorce must be given full faith and credit does not mean, however, tht it is determinative of all of the incidentals of marriage.

In *Estin v Estin*,[5] a case remarkably similar to this on its facts, the United States Supreme Court established the doctrine of divisible divorce. The basic holding of *Estin* was that while the Nevada decree must be given full faith and credit as to the continuance of the marriage relationship, it does not necessarily affect other incidentals of marriage such as property settlement or support payments. Speaking for the majority, Justice Douglas addressed himself to what seems to be an underlying inconsistency in the decision.

> "An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodation between conflicting interests.

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[3] *Williams* v *North Carolina*, 317 US 287; 63 S Ct 207; 87 L Ed 279 (1942), *Williams* v *North Carolina*, 325 US 226; 65 S Ct 1092; 89 L Ed 1577 (1945).

[4] US Const art IV, § 1.

[5] *Estin* v *Estin*, 334 US 541; 68 S Ct 1213; 92 L Ed 1561 (1948).

> This is why most legal problems end as questions of degree. That is true of the present problem under the Full Faith and Credit Clause. The question involves important considerations both of law and of policy which it is esesntial to state."

Estin leaves to the law and policy of the home state the decision as to whether the foreign divorce judgment will affect those aspects of the marriage over which the home state retains control.

The divorce in Nevada did not purport to adjudicate anything other than the marriage relationship. It does not mention property settlement or support payments. Further more, the law in Michigan appears to be that ex parte divorce decisions will not be given full faith and credit with respect to these matters.[6] The policy in Michigan is that the property rights of its citizens will be protected. We find therefore that the Nevada divorce did not terminate plaintiff's obligation to pay support under the prior Michigan judgment.

Reversed in part, affirmed in part. No costs.

/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams
/s/ John B. Swainson
/s/ Thomas E. Brennan
/s/ Thomas M. Kavanagh

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[6] *Malcolm* v *Malcolm*, 345 Mich 720 (1956).

APPENDIX B

OPINION OF STATE OF MICHIGAN COURT OF APPEALS, DIVISION THREE

(State of Michigan—Court of Appeals—Division 3)

(Filed October 1, 1971)

Before: Holbrook, PJ., and R. B. Burns and James J. Kelley, JJ. Kelley, J.

On December 21, 1964, the husband filed in the Allegan circuit court a complaint for absolute divorce, alleging exareme cruelty. On February 4, 1965, the wife filed a cross-complaint for separate maintenance, alleging extreme cruelty and specifically praying "That the marriage between the parties hereto not be dissolved and that a judgment of separate maintenance be entered in accordance with Act. No. 243 of the Compiled Laws of Michigan of 1889, being MSA 25.21 *et seq.*, as amended." Each party filed an answer to the other's complaint.

After a contested trial, the court found that the husband had become infatuated with another woman, causing the marriage to break up; that this constituted extreme cruelty on the part of the husband; and that the husband's allegations of extreme cruelty were unfounded. On July 26, 1965, a judgment for separate maintenance was filed which recited "that cross-plaintiff is hereby granted separate maintenance from the cross-defendant upon her cross bill of complaint." The judgment required the husband to make specified payments for the wife's support.

On August 11, 1965, the husband filed a claim of appeal to the Michigan Court of Appeals and paid the appeal fee.

On October 6 of the next year (1966) that appeal was dismissed.

Apparently some time during August 1965, the husband moved to the state of Nevada where on October 7, 1965, he obtained a decree of absolute divorce. The following day he remarried and has since lived and been employed in Nevada. The wife had not appeared in the Nevada proceeding and denies that there was any personal service of papers upon her as required by the Nevada code of civil procedure.[1]

The Nevada decree recites that the wife "since the marriage of the parties hereto has treated the plaintiff with extreme cruelty." The decree is silent as to any support or alimony for the wife. The husband never paid any alimony or support for the wife under the Michigan judgment or otherwise.

In May, 1969, the husband filed in the Michigan court a motion seeking to have the Michigan judgment for separate maintenance amended to a judgment for asolute divorce. In October of the same year the husband filed in the Michigan court a "motion for preliminary injunction" seeking to restrain the wife from attempting to enforce in the Nevada court the Michigan judgment for separate maintenance. The court denied both these motions and determined that arrearages in support for the wife totalled $13,229 as of March 1, 1970.

On appeal the husband claims that the Nevada decree is entitled to full faith and credit, that the court misinterpreted an order changing the amount of support and that the amount of support ordered is excessive.

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[1] NRCP 4(e). *Moran* v *Second Judicial District Court*, 72 Nev 142, 297 P 2d 261. *Kelley* v *Kelley* (1969) (Nev) 454 P 2d 85.

Is the Nevada Decree of Absolute Divorce entitled to full faith and credit?

Seeking an absolute divorce on the ground of extreme cruelty, the husband commenced the Michigan proceedings. He pursued his claim through a contested trial to a decision on the merits and an appeal to the Court of Appeals. Throughout this period the circuit court, followed by the Court of Appeals,[2] cointinuously had jurisdiction over the parties and the subject matter, and no other court could have acquired jurisdiction. It is a familiar, well-established rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue. *Allen* v *Allen* (1915), 188 Mich 532, 535; *Detroit United Ry* v *Circuit Judge* (1919), 204 Mich 543; *Mulford* v *Stender* (1921), 215 Mich 637, 640. Any other rule could lead to unfairness and absurdity. Under the circumstances present here the Nevada decree, which was rendered during the pendency of the Michigan proceedings and which involved the same parties, subject matter and proposed relief, is void.[3] It is not necessary to decide the wife's other contentions that the Nevada court lacked jurisdiction.

Is the amount of alimony or support for the wife excessive?

The husband claims that the trial court misinterpreted its own order for support and, therefore, the amount is excessive.

The record includes the following: The parties were married in 1943 and lived together until October 1964. In 1947, there was born to them a child whom they raised

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[2] Michigan General Court Rule 802.1.

[3] See *Albaugh* v *Albaugh* (1948), 320 Mich 16 and cases there cited.

and who is now of full age. During the marriage the wife worked in a factory in order that the husband might continue his education. The wife claimed that her state of health would not allow her to have full time employment and that she earned only enough to pay her monthly drug bill. At the time of the judgment the husband earned a salary of $9,600 for the school year, with a potential for earning an additional $1,600 during the summer months. Subsequently he became vice-president of a branch of the University of Nevada.

The original judgment required the husband to pay $40 per week, to make payments of $146 per month on the mortgage on the house which the wife was occupying, and to pay premiums for her hospital and medical insurance. Due to the husband's failure to pay anything, the mortgage was foreclosed, leaving the wife without a home. The court amended the judgment and interpreted the amendment to require the husband to pay $60 per week and to pay for all reasonable necessary medical requirements of the wife.

Although the husband never made any payments, he now claims that after the amendment he "operated under the belief" that he was to pay only $20 per week as support.

In interpreting the order in question and in fixing the amount for the wife's support, the court did not abuse its discretion. *Pinchuk* v *Pinchuk* (1947), 317 Mich 523.

Affirmed. Costs to appellee.

OPINION CONCURRING AND DISSENTING IN PART BY R. B. BURNS

(State of Michigan—Court of Appeals—Division 3)

(Filed October 1, 1971)

Before: Holbrook, P.J., R. B. Burns and James J. Kelley, J.J., R. B. Burns, Concurring in part: dissenting in part.

I concur with my brothers that the Nevada judgment cannot affect the obligation of the plaintiff to support the defendant, but I cannot agree that the Nevada decree is void.

The cases cited by Judge Kelley (*Allen* v *Allen* [1915], 188 Mich 532, 535; *Detroit United Ry* v *Circuit Judge* [1919], 204 Mich 543; *Mulford* v *Slender* [1921], 215 Mich 637, 640) stand for the proposition as he states it: "It is a familiar, well-established rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue." But the facts of those cases are different from the facts of the present case.

In *Allen* v *Allen, supra,* the plaintiff was a resident of Flint, Michigan. On his way to Alaska during the gold rush he married the defendant in Seattle, Washington. They separated and upon his return to Flint he instituted divorce proceedings and after the defendant filed an answer and a cross-bill he had the case dismissed because he was not sure of his necessary residency requirements. He did not obtain permission from the court to dismiss the bill. The defendant had the case reinstated and obtained a divorce decree. In the meantime, the plaintiff had returned to Nome, Alaska where he obtained a divorce. The

trial judge found, and the Supreme Court agreed, that the plaintiff had not abandoned his residency in Flint, and that the stay in Alaska was temporary.

In *Detroit United Ry* v *Circuit Judge, supra,* the headnote is sufficient to state the case. The headnote reads as follows:

> "Where a suit attacking the validity of an ordinance of the city of Detroit fixing the maximum rate of fares on certain street railway lines in said city was pending in the Federal court, it had exclusive jurisdiction, and the State court was without jurisdiction to issue an injunction also involving the validity of said ordinance."

In *Mulford* v *Stender, supra,* a suit was filed in Wayne County Circuit Court. A bill of interpleader was filed asking the court to delay the case as an action had been filed in the Circuit Court for Cook County, Illinois. The Supreme Court held that the Wayne County Circuit Judge, having first acquired jurisdiction of the matter, had the right to dispose of the issue.

In the present case plaintiff moved to Nevada and obtained a divorce after his wife had been granted a judgment for separate maintenance.

Following the *Williams cases (Williams* v *North Carolina I* [1942], 317 US 287, [63 S Ct 207, 87 L Ed 279], and *Williams* v *North Carolina II* [1945], 325 US 226 [65 S Ct 1092, 89 L Ed 1577]), the question arose whether a valid *ex parte* divorce entered at the domicile of only one party to the marriage automatically terminated the wife's right to support. This question was settled by the theory of divisible divorce, foreshadowed in *Esenwein* v *Pennsylvania* (1945), 325 US 278, (65 S Ct 1118, 89 L Ed 1609) (concur-

ring opinion per Douglas, J.) and set forth in *Estin* v *Estin* (1948) 224 US 541, (68 S Ct 1213, 92 L Ed 1561), where the Court held that an *ex parte* Nevada divorce procured by the husband did not terminate the wife's prior adjudicated right to separate maintenance:

> "The result in this situation is to make divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern." 334 US at 549.

Finally, in *Vanderbilt* v *Vanderbilt* (1957), 354 US 416, (77 S Ct 1360, 1 L Ed 2d 1456), the Court perfected the divisible divorce theory by its holding that even when the wife's right to support had not been reduced to judgment before the *ex parte* divorce, that divorce could not affect her support rights. The Court rested its holding on the due process clause: since the foreign state had no personal jurisdiction over the absent spouse, its decree "* * * to the extent it purported to affect the wife's right to support, was void and the full faith and credit clause did not obligate New York to give it recognition." Since the due process clause forbids the divorce court to adjudicate the absent wife's right to support, it follows that she cannot be deprived by that court of whatever rights of support she had under the law of her domicile at the time of that divorce. This line of reasoning was accepted by the Courts of this state in *Malcolm* v *Malcolm* (1956), 345 Mich 720. In accord are *Farnham* v *Farnham* (1964), 80 Nev 180, 391 P 2d 26 and *Hudson* v *Hudson* (1959), 52 Cal 2d 735, 344 P 2d 295, among others.

In the instant case the Nevada court did not pronounce nor did it attempt to pronounce, judgment respecting support of Mrs. Owen. The State of Michigan having had personal jurisdiction over both plaintiff and defendant had provided support in its 1965 judgment of separate maintenance. Accordingly, I would hold that the Nevada judgment of divorce is entitled to full faith and credit only insofar as it affects the marital status of the parties Mr. and Mrs. Owen are no longer husband and wife. However, the Nevada judgment in no way would affect the plaintiff's obligations to support his former wife.

APPENDIX C

ORDER DENYING MOTION AND VOIDING NEVADA JUDGMENT

(State of Michigan—Circuit Court—County of Allegan)

(Filed October 15, 1969)

This cause having come on to be heard on August 4 1969, on Plaintiff's motion to amend Judgment for Separate Maintenance to Judgment for Divorce, supported by purported Decree of Divorce between the parties entered October 7, 1965 in the 8th Judicial District Court for the State of Nevada, in and for the County of Clark, and the Answer and Cross-Petition of Defendant and for voiding of said purported Decree of Divorce, and the Court having examined the pleading herein, the authorities presented by counsel, having taken the testimony of Defendant in open Court, having heard the arguments of counsel for both parties, and having found as fact in an Opinion from the bench that Plaintiff had not acquired domicile in the

State of Nevada on the date in which said Divorce Decree was granted, upon motion of Gerald M. Henry, the attorney for Defendant;

It is ordered that Plaintiff's motion be and is hereby dismissed and denied, and;

It is further ordered that the Decree of Divorce obtained by Plaintiff in Nevada is absolutely void under Michigan law, and the Judgment for Separate Maintenance entered herein July 26, 1965, as amended April 12, 1966, copy of which is hereto attached, is hereby ratified and confirmed in all respects, and the parties hereto are still husband and wife under Michigan law, and;

It is further ordered that Gerald M. Henry is hereby granted a Twenty-five ($25.00) Dollar hearing fee, payable by Plaintiff, to apply on Defendant's costs in defending herself against Plaintiff's petition.

Raymond L. Smith,
Circuit Judge.

Approved for Entry:

Ricardo Meana
Attorney for Plaintiff
Business Address:
1000 McKay Tower
Grand Rapids, Michigan 49502
Dated:....., 1969.

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MICHAEL BODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO 72-1685

BEN OWEN,
Petitioner,

v.

ANGELINE BARBARA OWEN,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO 72-1685

BEN OWEN,
Petitioner,

v.

ANGELINE BARBARA OWEN,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioner respectfully requests that this Court grant rehearing of its order dated October 9, 1973, which denied certiorari, and that the Court now grant certiorari.

The Petition for certiorari previously filed herein presented the questions:

(1) Whether the action of the Michigan Supreme Court in (a) holding that a sister state *ex-parte* judgment of di-

vorce does not terminate a Michigan separate maintenance order, and (b) also holding that a Michigan *ex-parte* Judgment of Divorce terminates a foreign separate maintenance Judgment, is a denial of full faith and credit as required by U.S. Constitution, Article 4, Section 1.

(2) Whether the Michigan Supreme Court Opinions, which constitute State action, which declare that a Michigan *Ex-Parte* Judgment of Divorce terminates a sister state support order, whereas a sister state *ex-parte* Judgment of divorce does not terminate a Michigan separate maintenance order, is a denial of equal protection of the law, U. S. Constitution, Fourteenth Amendment, Section I, in that it grants relief requested by the Petitioner to residents of the State of Michigan but denies the same relief to non-residents who are subject to the Court's Jurisdiction?

As grounds for this Motion, Petitioner states the following:

Michigan law is clear that Separate Maintenance support does not survive Absolute Decree of Divorce.

While it was held in *Estin* v *Estin,* 334 U.S. 541, 68 S. Ct. 1213 (1943), that a state may determine whether or not a domestic separate maintenance decree shall survive a sister state divorce decree, it was also stated that said state must have such a policy to stand as its determination. It may not arbitrarily change such and discriminate against out-of-state *ex-parte* divorces.

Prior to January, 1972, the law of Michigan was such that if a wife prayed for Separate Maintenance and husband sought by a cross-bill an absolute decree of divorce, but failed to establish his right to such, wife would obtain separate maintenance but could not be forced to accept a decree of absolute divorce. MCLA 552.301; *Johnson* v *Johnson,* 22 N.W. 2d 751, 314 Mich. 376 (1946); *Kelly* v. *Kelly,* 233 N.W. 2d 170, 252 Mich. 92 (1930).

The Legislature, in 1971, repealed MCLA 552.301, and amended the law of separate maintenance, and the state policy, by amending with an effective date of January, 1972, MCLA 552.7, which reads:

(1) An action for separate maintenance may be filed in the circuit court in the same manner and on the same grounds as an action for divorce. In the complaint the plaintiff shall make no other explanation of the grounds for separate maintenance than by use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for separate maintenance alleged or deny them without further explanation. An admission by the defendant of the grounds for separate maintenance may be considered by the court but is not binding on the court's determination. The defendant may also file a counterclaim for divorce.

(3) If the defendant files a counterclaim for divorce, the allegation contained in the plaintiff's complaint as to the grounds for separate maintenance may be considered by the court but is not binding on the court's determination.

(4) If evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved, the court shall enter:

(a) A judgment of separate maintenance if a counterclaim for divorce has not been filed.

(b) A judgment dissolving the bonds of matrimony if a counterclaim for divorce has been filed.

MCLA 552.7 clearly dictates at 4 (a) and (b) that if plaintiff files an action for separate maintenance and defendant counterclaims for divorce, the court, upon sufficient evidence, *shall* enter a Judgment dissolving the marriage.

This revision of the Separate Maintenance Law of the State of Michigan has, in effect, clarified the Michigan stance on whether or not its Separate Maintenance Decree shall survive a sister state's *ex parte* decree of divorce. A defendant may now, under MCLA 552.7, compel the court, by counterclaiming for divorce, to dissolve the bonds of matrimony if it grants any relief at all. Since this now be the case, it must also follow, of necessity, that an *ex-parte* divorce from a sister state would have the same effect as a counterclaim for divorce in the Michigan Courts, to-wit: To terminate separate maintenance.

If such were not the case the rule of *Estin, supra,* would be violated. Prior to 1971, the Legislature of the State of Michigan allowed the Courts, regardless of a counterclaim by defendant for divorce to grant separate maintenance, and further, to determine whether it should survive an ex-parte divorce decree of a sister state. The Michigan Courts no longer have this prerogative in that a defendant may now simply counterclaim for divorce and effectively prevent any separate maintenance orders. For a Michigan court now to refuse to recognize that a sister state *ex-parte* divorce would have the same effect as an absolute decree of divorce granted by the Michigan Court under MCLA 552.7, would be wholly arbitrary and unacceptably discriminatory.

As Petitioner's earlier Petition for Certiorari pointed out, Michigan's policy has at best been one of inconsistency. The statutory law of Michigan is now clear that either party may at any time wholly avoid separate main-

tenance. The courts no longer have discretion to enter judgment for separate maintenance or divorce. It follows that if a defendant may totally avoid a separate maintenance obligation after divorce by obtaining such divorce in Michigan, it would be blatant discrimination for the Michigan courts to hold that a sister state *ex-parte* divorce decree would have any less force and effect.

Since the holding of the Michigan Court in the instant case is directly in conflict with the law of Michigan in regard to its own residents, it clearly contravenes the law as set down by *Estin, supra,* and is wholly and totally violative of the Constitution of the United States, Article Four, Section 1 and the Constitution of the United States, Fourteenth Amendment, Section 1. Therefore, compelling reasons are evident why the question presented should be reviewed and definitively determined by this Court.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as well as in the Petition for Certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

MAX D. McCULLOUGH
Attorney for Petitioner.
15 South Gratiot Avenue
Mt. Clemens, Michigan 48043

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2, of Rule 58.

Max D. McCullough

Oct 31, 1973